80-1161

Supreme Court, U. S.
FILED
JAN 12 1981
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

No. _____

Samuel Johnson ..... *Petitioner*

V.

State of Arkansas ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

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III. QUESTION PRESENTED

Whether the Trial Court can try Petitioner in his absence after a recess between a hearing on a Motion to Suppress and the beginning of the trial on the merits of the case.

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IN THE
SUPREME COURT OF THE UNITED STATES

SAMUEL JOHNSON PETITIONER

VS. NO. _____

STATE OF ARKANSAS RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

Petitioner, Samuel Johnson, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas entered in the proceeding September 15, 1980.

I. OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at 270 Ark. 247 (1980) and is attached as Appendix A. The record of the hearing on Petitioner's Motion to Suppress and his Trial held September 4, 1979, is attached as Appendix B.

II. JURISDICTION

The opinion of the Arkansas Supreme Court was entered September 15, 1980. Petitioner's Petition for Rehearing was denied on October 21, 1980. This Petition for a Writ of Certiorari was filed within ninety days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. 1357 (3).

III. QUESTION PRESENTED

Whether the Trial Court can try Petitioner in his absence after a recess between a hearing on a Motion to Suppress and the beginning of the trial on the merits of the case.

IV. CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

V. STATEMENT OF THE CASE

On September 4, 1979, Petitioner appeared before the Pulaski County Circuit Court for trial on an eleven count information. All parties announced ready for trial. The Court proceeded to hear a Motion to Suppress filed by Petitioner. Witnesses were called and testimony was heard by the Court and the Motion was denied. (T. 110) Following the denial of the pre-trial motion, the Court announced a ten minute recess following which the Court " . . . will proceed with the trial". (T. 111) Upon reconvening, Petitioner was not present in Court. The Court recessed for an additional hour and when Court was reconvened Petitioner was still not present. Petitioner's attorneys objected to continuing the trial in Petitioner's absence, moved for a continuance and asked the Trial Court to excuse himself from the case. (T. 114-117) The Trial Court denied all motions and ruled that Trial had commenced prior to the recess and proceeded with the trial. (T. 121). Throughout the trial, Petitioner's attorneys objected to the proceedings and the evidence. Petitioner was found guilty of all counts and further was found to have been previously convicted of three felonies. Sentencing was postponed at that time. (T. 273). On December 5, 1979, which time the Court sentenced him pursuant to the guilty verdict to three years on each of eleven counts and directed that each sentence be consecutive to the other. (T. 285-287).

On appeal to the Arkansas Supreme Court, the conviction was affirmed. The Court held that Ark. Stat. Ann. 43-2101 (Repl. 1977) allowed a trial to proceed to verdict when a defendant voluntarily absents himself

during trial. The Court ruled that the trial had commenced in this case and further ruled that Petitioner had waived his rights under the Sixth Amendment to the United States Constitution.

VI. REASONS FOR GRANTING THE WRIT

A. THE JUDGMENT BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

I.

Petitioner appeared before the Pulaski County Circuit Court September 4, 1979, at which time a hearing on a Motion to Suppress was scheduled as well as his trial on an eleven count information. The parties announced ready, witnesses sworn and the pretrial hearing was conducted. Upon conclusion of the hearing, the trial court denied the motion and declared a ten minute recess. Upon reconvening Court, Petitioner was not present and the Court declared an additional one hour recess. The Court reopened and despite objections by petitioner's attorneys, petitioner was tried and found guilty of all counts totally in absentia. Petitioner was later taken in custody and appeared before the Circuit Court and was sentenced to three years on each count to be served consecutively.

Petitioner appealed the verdict to the Arkansas Supreme Court and on September 15, 1980, the Court affirmed the conviction. Petitioner requested a rehearing which was denied on October 21, 1980. The Court relying on Ark. Stat. Ann. 43-2101 and *Taylor v. United States*, 414 U.S. 17 (1973) ruled that petitioner had voluntarily absentia himself from trial after it had commenced.

Ark. Stat. Ann. 43-2101 provides that when a defendant is on bail and absents himself voluntarily during a trial, the trial may proceed to a verdict in his absence. The Arkansas Court has never directly addressed the point at which a trial begins. *Taylor v. U.S.*, supra, interprets Federal Rules of Criminal Procedure, Rule 43 A & B, which states:

> (a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
>
> (b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall not be considered to have waived his right to be present whenever a defendant, initially present,
>
> > (1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or
> >
> > (2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

The Court ruled that the Sixth Amendment right of confrontation can be waived after trial has commenced. Further, citing *Diaz v. United States*, 223 U.S. 442, 445, 56 L.Ed. 500, 32 S.Ct. 250 (1912), the Court stated that where the offense is not capital and the accused is not in custody, the prevailing rule has been that if, after the trial has begun

in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the Court free to proceed with the trial in like manner and with like effect as if he were present. In *United States v. Miller*, 463 F.2d 600, Certiorari denied. *Gregory v. United States*, 93 S.Ct. 30, 409 U.S. 956, 34 L.Ed.2d 225 it was ruled that trial had commenced when the case was called and the jury selected though not sworn.

The authorities cited and the Arkansas Statute as well as Federal Rule 43 are in agreement that waiver of a defendant's Sixth Amendment rights can occur *after trial commences.* There is authority for the proposition that trial can be held with the defendant absent voluntarily whether or not trial has commenced, *United States v. Pastor*, 557 F.2d 930 (C.A.N.Y 1977) and *United States v. Powell*, 611 F.2d 41 (C.A.S.C. 1979). These rulings are in direct conflict to the rulings previously cited and the general rule propounded therein.

The logic in *Taylor v. United States*, supra, is inescapable. No accused should be able to voluntarily thwart a trial in progress. However, the converse proposition contains equal logic. When the trial has not begun, there is little or no waste of time, effort or money in delaying trial until the presence of the accused can be assured. In the instant case, Petitioner attended a pretrial hearing on a Motion to Suppress and failed to return after a recess for the start of his trial on the merits of the charges. It appears patently clear that trial had not commenced. A hearing had been conducted on the same date as the trial but that hearing and the evidence presented therein could not be used in determining the guilt of Petitioner. The two proceedings are separate and distinct and merely happened to occur on the same date.

VII. CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APENDIX "A"

Samuel Johnson a/k/a Samuel
Khabeer v. State of Arkanas
CR. 80-102
Opinion delivered September 15, 1980

Appeal from Pulaski Circuit Court,
First Division, Floyd J. Lofton,
Judge; Affirmed.

McArthur & Lassiter, P.A., for Appellant

Steve Clark, Atty. Gen., by: Jack W.
Dickerson, Asst. Atty. Gen. for
Appellee

Darrell Hickman, Associate Justice

Samuel Johnson, also known as Samuel Khabeer, was convicted in the Pulaski County Circuit Court of criminal possession of a forgery device, two counts of forgery in the second degree, and eight counts of theft by receiving. He was sentenced to a total of 33 years' imprisonment and, having three prior felony convictions, was ordered to serve that sentence as an habitual offender.

On appeal Johnson argues that his conviction should be reversed for two reasons. First, he states the trial court erroneously admitted evidence obtained in an illegal search of his residence. Next, he argues that the court was wrong in trying him in his absence. We find no error and affirm the judgment.

On May 2, 1979, an employee of the Union National Bank in Little Rock became suspicious when two checks

were cashed on the Barnes Tree Service Company. While a female was cashing the second check, the bank employee called the Barnes Tree Service, learned that checks numbering in sequence 2623 to 2649 had been stolen from Barnes and the check was probably forged. Before the bank employee could act, the female left the bank. The employee followed the woman and obtained the license number of the car that she entered. The Little Rock Police were called and given this information. The police located the car, followed it to the residence of Samuel Johnson, and arrested Johnson when he came back out of the house and got into the car. Johnson and his wife refused consent for a search of their residence. As Johnson was being arrested, a police officer found pieces of a check outside Johnson's house. Pieced together, these pieces formed a check on Barnes Tree Service. The first three numbers on the check were 264.

Johnson was taken to the police station and a search warrant was obtained based on an affidavit of one of the police officers. That affidavit is reproduced as an exhibit to this opinion.

A police officer kept Johnson's residence under surveillance while the search warrant was being obtained. The house was searched that day pursuant to the warrant. It is not disputed that the police were looking for Barnes Tree Service checks, numbered 2623 through 2649, which had been reported stolen. An extensive search was conducted but none of those checks were found. However, the police did discover a virtual bonanza of credit cards, social security cards, and identification cards, which were in the names of other people. A check protector was found belonging to the Keith Smith Company, Inc., of Hot Springs, Arkansas. Johnson was charged with two counts of forgery relating to Barnes Tree Service and numerous other

charges based on the seized evidence. He was convicted on all counts.

Most of the documents were found in an attic space which was apparently being renovated to serve as a room. The space was accessible by a stairway. Other documents were found in the garbage.

Johnson's first allegation of error is that there was no probable cause for the search. The search warrant was based on the affidavit appended which shows that there is no question that the police had probable cause in this case to obtain the search warrant. The first three numbers on a Barnes Tree Service check, found outside the Johnson residence, were 264. It had been reported that this check was one of a series of checks which had been stolen from Barnes Tree Service. The bank officials supplied information confirming that two of these checks on Barnes were passed on May 2, 1979, one by a male, one by a female. The bank employee followed the female and obtained the car license number; the police saw Johnson enter that car and apprehended him shortly thereafter.

It is not required that sufficient information to convict a person be available at the time a search warrant is obtained. The only requirement is probable cause to believe that the place to be searched contains evidence of the supposed crime. *Spinelli v. United States*, 393 U.S. 410 (1969). We have no doubt such cause existed in this case.

The second argument by Johnson is that the trial judge conducted the trial in his absnece. On July 17, 1979, notice was sent that a nonjury trial had been set for September 4, 1979. On the morning of the trial, the judge

first called the case, and discovered a pending motion to suppress the evidence. Testimony was taken on the motion; Johnson was present throughout this proceeding with his attorney. At the conclusion of that hearing, the court stated it would recess for ten minutes. When court reconvened, Johnson was not present. Nobody knew of Johnson's whereabouts and Johnson's attorney objected to further proceedings in Johnson's absence. The court announced that after another recess of one hour it would reconvene and proceed with the trial in Johnson's absence.

When the court reconvened, Johnson still was not present. It was at this time that the attorney for Johnson related that earlier in the morning Johnson had indicated his dissatisfaction with the trial judge and asked his counsel to obtain the disqualification of the judge. The judge pointed out that he had specifically asked Johnson if he so objected and Johnson had not. The judge ruled that the trial had "commenced" and that Johnson's cause could proceed in his absence.

Johnson argues that since the "trial" had not commenced, the court could not try him *in absentia*, citing the case of *Taylor v. United States*, 414 U.S. 17 (1973) as his authority. That argument is based on the right to confront witnesses as guaranteed by the Sixth Amendment to the United States Constitution.

Refined, Johnson's argument is that technically the "trial" had not commenced prior to his departure. He contends that he left after a pretrial hearing but before the actual trial was started.

Ark. Stat. Ann. §43-2101 (Repl. 1977) provides that when a defendant is on bail and absents himself voluntarily

during a trial, the trial may proceed to a verdict in his absence. (Johnson was not sentenced until he was found and brought before the court.)

There is no doubt that in every case, except a capital case, a criminal defendant can waive the right to be present during a trial. *Taylor v. United States, supra.* The trial judge found that the trial had commenced, that the defendant had voluntarily absented himself, and that the defendant had waived his right to be present. We cannot say that decision was clearly wrong.

This was a nonjury case which had been set for trial for almost two months. The record begins by stating that on the trial date, "This cause came on to be heard, all parties announcing they were ready." The judge asked the defendant, Samuel Johnson, if he had any objections to the court hearing his case. Johnson said "no." The court asked if the parties wanted the rule; that is, if they wanted the witnesses excluded except when testifying. It was then that the court mentioned that there was a motion to suppress the search warrant and the case proceeded on that issue.

This was not the case of a hearing set specifically for pretrial; the matter was specifically set for trial. We cannot say in this case that the trial court was clearly erroenous in finding that the trial had commenced at the time Johnson voluntarily absented himself.

Affirmed.